BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SPOKANE ROCK PRODUCTS INC., LARRY J. REES AND JEANNE A. REES, Appellants, v. SPOKANE COUNTY AIR POLLUTION CONTROL AUTHORITY, AND INLAND ASPHALT COMPANY Respondents.	PCHB NO. 05-127 **ORDER DISMISSING SPOKANE ROCK PRODUCTS, INC.**

This case is an appeal of decisions by the Spokane County Air Pollution Control Authority ("SCAPCA") relating to Inland Asphalt Company's ("Inland Asphalt") facility in Spokane. The matter is before the Pollution Control Hearings Board ("Board) on the Motion by Inland Asphalt to Dismiss Spokane Rock Products Inc. ("Spokane Rock") for lack of standing. William H. Chapman and Peter G. Scott of Preston Gates Ellis represented Appellant Spokane Rock Products. Michelle Wolkey of Wolkey McKinley represented SCAPCA. Stanley Schwartz, Stacy Bjordahl, and Tim Lawler of Witherspoon, Kelley, Davenport & Toole represented Inland Asphalt. The Board consisted of Bill Clarke, presiding, and William H. Lynch.[1] The Board held an oral argument on the motion on October 27, 2005. Kim Otis of Gene Barker & Associates was the court reporter. The written record consisted of:

1. Inland Asphalt's Motion to Dismiss Spokane Rock and Declaration of Mark Murphy, P.E.

[1] One of the three Board member positions is currently vacant.

2. Spokane Rock's Response to Inland Asphalt's Motion to Dismiss and Declaration of Steve Robinson;
3. SCAPCA's Response to Inland Asphalt's Motion to Dismiss;
4. Inland Asphalt's Reply In Support of Motion to Dismiss and Declaration of Stacy A. Bjordahl;
5. Inland Asphalt's Motion to Strike Response Brief of Spokane Rock and Declaration of Steve Robinson; and
6. Spokane Rock's Response to Inland Asphalt's Motion to Strike and Affidavit of Amber Balch.

I. BACKGROUND

[1]

Spokane Rock and Larry and Jeanne Rees appealed a Final Mitigated Determination of Nonsignificance (MDNS) and Notice of Construction (NOC) issued by SCAPCA to Inland Asphalt. Inland Asphalt has proposed to operate an asphalt plant at its Perry Road quarry in the City of Spokane Valley. The Reeses live in a subdivision near Inland Asphalt's Perry Street quarry. Spokane Rock operates an asphalt plant on Havana Road in the City of Spokane. Spokane Rock's Havana Road asphalt plant is approximately 10 miles to the northwest of Inland Asphalt's Perry Street quarry. *(Notice of Appeal; Declaration of Mark Murphy).* Spokane Rock's Notice of Appeal alleged, among other things, that the NOC did not require the level of air pollution control technology required by SCAPCA for similar asphalt plants in the Spokane County air shed. *(Notice of Appeal).*

[2]

The Board's Pre-Hearing Order established the following legal issues in the appeal:

> **1.** Whether notice of construction approval (NOC) 1290 issued by SCAPCA to Inland Asphalt Company complies with applicable regulations, including whether it requires best available control technology (BACT)?

2. Whether SCAPCA properly applied SEPA with respect to NOC 1290 issued to Inland Asphalt, including:

1) Whether SCAPCA properly considered the information in comments received from Spokane County in its processing of the NOC?

2) Whether SCAPCA properly considered changes to the proposal and new information regarding the proposal?

3) Whether SCAPCA followed the time periods required for public comment and prior to taking action?

4) Whether SCAPCA's issuance of a Final MDNS was proper?

3. Whether appellants have standing to pursue this matter, including whether Appellants failed to timely comment during the SEPA process?

[3]

Inland Asphalt filed a motion to dismiss on Legal Issue #3, asserting that Spokane Rock lacks standing to appeal the NOC and MDNS issued by SCAPCA. Inland Asphalt argued that Spokane Rock cannot show it is within the legally protected zone of interest or that it suffers an injury in fact. Regarding injury in fact, Inland Asphalt asserted that Spokane Rock's assertion that the Inland Asphalt NOC is less stringent than its own does not establish injury in fact. Inland Asphalt also argued that Spokane Rock's interest in the case is economic, and that economic interests are not within the zone of interest of either the State Environmental Policy Act or the Washington Clean Air Act. Inland Asphalt also noted that Spokane Rock Products had appealed its own NOC, and through this appeal was attempting to require Inland Asphalt's NOC to include air pollution controls that Spokane Rock itself appealed. *(Inland Asphalt Motion at 4-6; Declaration of Mark Murphy).*

[4]

Spokane Rock responded that while it is an economic competitor, that it is within the zone of interest because its directors, officers, and employees live, work, and recreate in the

same air shed as Inland Asphalt. Spokane Rock asserts that diminished air quality jeopardizes the health and productivity of its workers. Spokane Rock argues that it suffers an injury in fact because lack of air pollution controls in the Inland Asphalt NOC and MDNS could impact Spokane Rock's ability to obtain permits for its own plant. Spokane Rock asserts that the addition of air pollutants by Inland Asphalt into the same air shed and PM10 Nonattainment area could ultimately limit its own operations and harm the property interest of Spokane Rock Products' air quality approvals. Spokane Rock also argues that the NOC and MDNS has damaged Spokane Rock's reputation in the community by lowering public perception of the ability of asphalt plants to control odors and protect public health. *(Spokane Rock's Response at 5-6; Declaration of Steve Robinson).*

[5]

In reply, Inland Asphalt argued that Spokane Rock is a for-profit corporation, not an environmental organization, and that it does not meet the germaneness test for organizational standing. SCAPCA's response supported Inland Asphalt's Motion to Dismiss.

II. ANALYSIS

[1]

If, on a motion for judgment on the pleadings, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." CR 12 (c). Accordingly, the analysis will proceed in a manner similar to a motion for summary judgment.

Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a

summary judgment proceeding, the moving party has the initial burden of showing that there is no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

> If a moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. [Citation omitted.] Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.

Hash v. Children's Orthopedic Hosp., 110 Wn.2d 912, 915, 757 P.2d 507 (1988). In ruling on a motion for summary judgment, the Court must consider all of the material evidence and all inferences therefrom in a manner most favorable to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Id.; Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960).

[2]

In this case, Spokane Rock bears the burden of proof on standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-563 (1992); *Center for Environmental Law & Policy v. Department of Ecology*, PCHB No. 96-165 (1997) 561.

[3]

The threshold test for determining whether an organization has standing is:

(1) That the members of the organization would otherwise have standing to sue in their own right;

(2) That the interests that the organization seeks to protect are germane to its purpose; and

(3) That neither claim asserted nor relief requested requires the participation of the organization's individual members.

International Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-214, (2002). The Board has determined that the first two prongs of the organizational standing test apply to cases before the Board, while the third prong typically would not, as it is judicially self-imposed for administrative convenience and efficiency in cases where an organization seeks money damages on behalf of individual members. *Olympia and Vicinity Building and Construction Trade Council and Affiliated Unions* v. *Ecology and Cardinal FG Company*, PCHB No. 04-147 (2005) (Second Order on Motions to Dismiss Appeal for Lack of Standing). See also *Hale et al. v. Island County et al*., SHB No. 04-022/023 (2005) (Decision on Motion to Dismiss for Lack of Standing).

[4]

Once the standing requirements for an organization provided in the *International Ass'n of Firefighters, Local 1789* decision are fulfilled, then other traditional elements of standing apply. These other standing elements are whether the Appellant (1) has suffered an injury in fact that is (2) within the zone of interests protected by the statute, and that (3) The Board has authority to redress the injury suffered. *Ironworkers Local 29 et al, v. Department of Ecology and the City of Goldendale,* PCHB No. 01-007 (2001)(Order Granting Motion to Dismiss For Lack of Standing), *aff'd* 118 Wash. App. 1024 (2003). See also *Save a Valuable Environment v. Bothell*, 89 Wn. 2d 862, 865-68 (1978).

The Board reviews the elements of the organizational standing traditional standing elements in turn.

Organization Members Standing to Sue

[5]

The first element relates to the officers, directors, and employees of Spokane Rock. Spokane Rock's response noted that these people live, work and recreate in the same air shed as Inland Asphalt's proposed plant. These people would have standing to sue as individual citizens if they met the traditional standing elements of injury in fact, zone of interests, and redressability.

Inland Asphalt's Motion to Dismiss raised the issue of whether Spokane Rock's appeal was germane to the company purpose, but the element of whether Spokane Rock officers, directors, or employees would have standing to sue in their own right was not raised until Inland Asphalt's reply brief. Consequently, the Board will not address the element of whether Spokane Rock officers, directors or employees have standing to sue as individuals as the Board does not generally consider arguments raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992). There are no facts before the Board on whether officers, directors, or employees of Spokane River would have standing in their own right to appeal the NOC and MDNS issued by SCAPCA.

Germaneness

[6]

Spokane Rock asserts that it has an interest in protecting air quality in the Spokane area both to protect its own air quality approvals and to protect the health and quality of life of its officers, directors, or employees. Inland Asphalt argues that there is no evidence that Spokane Rock's corporate purpose includes protecting the environment on behalf of its employees.

In the *Olympia and Vicinity Building and Construction Trade Council et al.* decision, the Board concluded that an association of labor unions had standing to challenge an air quality decision because the association's declaration of purpose included direction to take action on environmental health and safety issues on behalf of its members. An organizational or corporate document is factual evidence of an organization's purposes, though whether an appeal is truly germane to an organization's purpose is a question of law. Spokane Rock, like other companies in heavily regulated industries, is likely quite concerned about the health and safety of its workers and in environmental impacts from its own industry. However, in contrast to the OBCT case, there is no evidence that general protection of air quality in Spokane, or the protection of employees from air quality impacts, is germane to the corporate purpose of Spokane Rock. Thus, Spokane Rock does not meet the element of germaneness.

Injury in Fact

[7]

Injury in fact requires a showing of immediate, concrete, and specific injury. In this case, the types of injury claimed by Spokane Rock are either injury to the health and productivity of its workers (which fails the germaneness element) or relates to impacts to its own permit approval that could occur if air quality in the Spokane area is degraded. Specifically, Spokane Rock raises an issue of injury if the Spokane air shed falls into nonattainment for PM10. On this point, Inland Asphalt submitted evidence that the Spokane area has been in compliance for PM10 since 1994. *(Declaration of Stacy A. Bjordahl).* The injury claimed by Spokane Rock is speculative, in that it would only be injured by the NOC and MDNS if the approvals caused or contributed to

PM10 nonattainment, and such nonattainment then resulted in new limits or changes to Spokane Rock's air quality approvals. This chain of events is too remote to be considered injury in fact.

Zone of Interests Protected by the Statute

[8]

The zone of interest elements concerns whether the interest a party seeks to protect falls within the zone of interest that the environmental statute is designed to protect. *SAVE v. Bothell*, 89 Wn.2d 862, 865-868 (1978). An economic interest does not prevent an appellant from being within SEPA's zone of interest. *Kucera v. WSDOT,* 140 Wn.2d 200, 212-213 (2000). The same can be said for the zone of interest of the Washington Clean Air Act. However, the Board looks at standing issues involving economic impacts with heightened scrutiny. *OBCT v. Ecology*, PCHB No. 04-147 (2005), citing *Puget Sound Energy v. City of North Bend et al*., SHB 97-44 (1998).

In this case, the zone of interest of SEPA and the Washington Clean Air Act involves harm to air quality, the environment, and the protection of human health. The interest sought to be protected by Spokane Rock is its interest in the health and productivity of its company, and its property interest in its air quality approvals that could be affected by Inland Asphalt's approvals. The Board has already determined that Spokane Rock's stated interest in general protection of air quality is not germane to the company's purpose. Further, Spokane Rock's interest to be protected relates to the operation of its own company, rather than to environmental protection. Thus, it is not within the zone of interest sought to be protected by the statute.

Spokane Rock argued that the Board "has recognized a company's standing to challenge agency decisions alleged to negatively impact the environment that a company relies upon to do business," citing the Board's decision in *Cascade Gateway Foundation et al. v. Ecology*, PCHB No. 02-095 (2002). In that case, the Board found that the owner of an inn had standing to challenge a water quality discharge permit for a nearby sand and gravel operation based on alleged harm to the water supply for the inn. The proximity of the inn and its water supply to the sand and gravel pit is contrasted by the locations of the businesses here - Spokane Rock and Inland Asphalt are approximately 10 miles apart.

Board has Authority to Redress the Injury Suffered.

[9]

The injury complained of by Spokane Rock relates to impacts to its own permit approvals. As discussed above, this does not amount to an injury in fact. Thus, the Board does not address the redressability element.

[10]

Based on the foregoing analysis, the Board enters the following

ORDER

Inland Asphalt's Motion to Dismiss Spokane Rock for lack of standing is GRANTED.

SO ORDERED this 16th day of November 2005.

POLLUTION CONTROL HEARINGS BOARD

BILL CLARKE, Presiding

WILLIAM H. LYNCH, Member